Internal Revenue Service

memorandum

CC:TL:Br3
WEArmstrong

date: AUG 10 1989

to: Deputy Regional Counsel (General Litigation) CC:MW

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: Substitute for Return (SFR) Program
Effect of Millsap v. Commissioner

This memorandum is in response to your request for technical advice regarding the effect of Millsap v. Commissioner, 91 T.C. 926 (1988), on those taxpayers who relied on a prior Service position that taxpayers for whom returns under I.R.C. § 6020(b) are filed are subject to the limitations under I.R.C. § 6013(b)(2) for making a joint return election.

ISSUES

(1) Whether Millsap v. Commissioner, 91 T.C. 926 (1988), should be given retroactive effect with respect to those taxpayers who, prior to the decision in that case, filed joint returns which would be proper under Millsap.

(2) Whether taxpayers who, in reliance on the Commissioner's position prior to Millsap, superseded their I.R.C. § 6020(b) returns with "separate filing status" returns should be allowed to obtain the benefits of joint rates.

CONCLUSION

We believe that the Millsap decision should apply retroactively to all open years. Further we believe taxpayers whose situations parallel the facts of Millsap should be allowed to rely upon Millsap for all open years and should be allowed to use it to obtain a refund if they satisfy the requirements of I.R.C. § 6511. As to taxpayers who filed joint returns initially but who may have later filed separate returns because the Service rejected their joint returns, we believe that such taxpayers are not subject to the limitations under I.R.C. § 6013(b)(2). With regard to taxpayers who made no attempt to satisfy the requirement for electing joint status by filing a joint return, we believe such taxpayers are subject to the limitations under I.R.C. § 6013(b)(2) for making a joint return election.

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FACTS

Prior to the Tax Court's decision in Millsap v. Commissioner, 91 T.C. 926 (1988), it was the position of the Service that returns prepared under I.R.C. § 6020(b) for a nonfiler were separate returns of an individual for purposes of I.R.C. § 6013(b). Thus, any later joint returns filed by such individual with his or her spouse were subject to the limitations under I.R.C. § 6013(b)(2). As a result of the acquiescence in the decision of the Tax Court in Millsap, the Commissioner no longer takes the position that taxpayers for whom returns under I.R.C. § 6020(b) have been filed are precluded under I.R.C. § 6013(b) from obtaining the benefit of joint rates.

In your memorandum you stated that your office is now confronted with cases where taxpayers followed the Service's advice and either did not supersede the substitute for return (I.R.C. § 6020(b) return) at all, or superseded their substitute for return with returns electing "married filing separate" status. Because under Millsap, taxpayers who have not filed prior separate returns can file joint returns without regard to I.R.C. § 6013(b) you stated also that those married taxpayers who followed the Service's advice could be worse off than those nonfilers who did nothing at all. Because you believe the matter should be considered on a national basis and raises the question of whether Millsap should be given retroactive effect for those married taxpayers who had filed joint returns which would be proper under Millsap, you seek the benefit of our views.

DISCUSSION

Acquiescence in a decision means acceptance by the Service of the conclusion reached by a court. Actions of acquiescences in adverse decisions are relied on by revenue officers and others concerned as conclusions of the Service only to the application of the law to the facts in the acquiesced cases. See e.g., 1989-1 C.B. 1.

The Commissioner has complete power to modify, amend, or revoke his acquiescences and to make such changes retroactive as to all taxpayers or, in the exercise of his discretion, certain classes of taxpayers. Dixon v. United States, 381 U.S. 68 (1965). He may also exercise his discretion to make any modification prospective. I.R.C. § 7805(b). Because taxpayers are repeatedly warned that acquiescences are not to be relied upon in planning transactions, the Commissioner has rarely exercised his discretion to make a change in position prospective only. Thus an acquiescence applies to all open years, unless the Commissioner exercises the discretionary power given him under I.R.C. § 7805(b) to limit its retroactive effect. Dixon.

The Commissioner did not exercise his discretionary powers under I.R.C. § 7805(b) to limit the retroactive effect of his acquiescence in Millsap. Thus, we believe that the Millsap decision should apply retroactively to all open years. Accordingly, we believe taxpayers whose situations parallel the facts of Millsap should be allowed to rely upon Millsap for all open years and should be allowed to use it to obtain a refund if they satisfy the requirements of I.R.C. § 6511.

With respect to taxpayers who relied on the position of the Service prior to Millsap and either filed separate returns or filed separate returns after their joint returns were rejected by the Service, we believe the decision of R.H. Macy & Co. v. United States, 255 F.2d 884 (2d Cir. 1958) is helpful. In Macy, taxpayer, a department store which used the retail method of inventory valuation desired to switch to the "last-in, first-out" (LIFO) method of inventory valuation. However, because of the Commissioner's opposition to the use of LIFO by "retail method" taxpayers, taxpayer failed to file an election to use the LIFO method for 1942 within the time stated in the regulation.

In 1948, after the Tax Court had sanctioned the use of a combined retail method and LIFO method inventory for department stores, taxpayer first filed notice of election to use LIFO for 1942. Although 1948 was an open year in other respects, because taxpayer had failed to file notice of election to adopt LIFO for 1942 within the time prescribed by the regulations, the Second Circuit concluded that taxpayer could not recompute its taxable income for 1942 by using the LIFO method of inventory, notwithstanding that the failure occurred because the Commissioner opposed the taxpayer's exercise of its statutory right.

In arriving at its conclusion the Second Circuit stated that if taxpayer chose to avail itself of the LIFO method for 1942 it had to file its election at the time and in the manner prescribed by the Commissioner. It stated also that the fact taxpayer relied on the Commissioner's erroneous interpretation of the applicable law was not an excuse for taxpayer's delinquency.

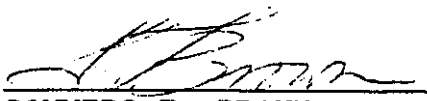
We believe that the taxpayers who made no attempt to satisfy the requirement for electing joint status by filing a joint return, but instead relied on the Commissioner's position and filed separate returns are subject to the limitations under I.R.C. § 6013(b)(2) for making a joint return election. Based on Macy, we believe reliance on the position of the Service that taxpayers subject to the substitute return program were subject to the limitations under I.R.C. § 6013(b)(2) is not available to such taxpayers as an excuse for not satisfying the basic requirement for obtaining the benefit of joint rates. These

taxpayers, like other taxpayers who actually filed joint returns, could have sought action by the Commissioner or from the courts if they desired. Because they did not, as the court noted in Macy, it is no excuse that their failure to file a joint return at all occurred because the Commissioner opposed the exercise of their statutory right to do so.

As to the taxpayers who filed joint returns initially but who may have later filed separate returns because the Service rejected the joint returns, we believe that such taxpayers are not subject to the limitations of I.R.C. § 6013(b)(2). This is because their failure to obtain joint rates resulted from the failure of the Commissioner to act on their joint return election, contrary to the holding in Millsap. Thus, such taxpayers should be allowed to rely on Millsap to obtain the benefit of joint rates for all open years.

If you have further questions or if we can be of further assistance in this matter, please let us know.

MARLENE GROSS

By: 

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